IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	

DEFENDANT TYSON FOODS, INC.'S REPLY TO STATE OF OKLAHOMA'S RESPONSE [DKT # 1983]TO DEFENDANT TYSON FOODS, INC.'S MOTION FOR PROTECTIVE ORDER WITH RESPECT TO STATE OF OKLAHOMA'S NOTICE OF DEPOSITION OF JOHN TYSON [DKT # 1975]

Defendant Tyson Foods, Inc. ("Tyson" or the "Company"), respectfully submits this Reply to State of Oklahoma's Response in Opposition to Defendant Tyson Foods, Inc.'s Motion for Protective Order with Respect to State of Oklahoma's Notice of Deposition of John Tyson. Plaintiffs' Response rests on their belated claim that one of Tyson's 30(b)(6) representatives was not prepared to their satisfaction for a deposition taken 18 months ago and unsupported speculation that during his six years as CEO John Tyson must have acquired some unspecified personal knowledge regarding Tyson's environmental policies relevant to this case. Neither of these assertions provide justification for Mr. Tyson's deposition. It is clear from the record that Plaintiffs' deposition notice to Mr. Tyson was simply retaliation for Tyson's request to depose Attorney General Edmondson. Mr. Tyson has no unique personal knowledge about the issues relevant to this case. The proposed deposition is intended for harassment rather than discovery purposes. Accordingly, this Court should grant Tyson's Motion for a Protective Order.

INTRODUCTION

In Tyson's Motion for a Protective Order, Mr. Tyson stated through an affidavit that he has no unique personal knowledge regarding this case beyond the testimony of company representatives already made available to Plaintiffs. In their response, Plaintiffs attempt to combat this allegation by attacking the testimony of Steve Patrick, a Tyson 30(b)(6) representative who Plaintiffs claim was "either ill-prepared or generally unknowledgeable on pertinent topics." Had Tyson made available an adequately prepared 30(b)(6) representative, Plaintiffs allege, "the State would agree that there would likely be no need to depose Mr. Tyson." Plaintiffs' Response, p. 2. The timing of this argument, made for the first time more than 18 months after Steve Patrick's deposition and in response to Tyson's Motion for a Protective Order, is curious, and evidence that Plaintiffs are more interested in the spectacle of deposing Mr. Tyson rather than obtaining relevant evidence.

Plaintiffs deposed Steve Patrick on August 21, 2007, more than 18 months before their March 30, 2009, Notice to Take the Deposition of Mr. Tyson. In a bizarre twist of logic, Plaintiffs claim that this delay in seeking a more adequate representative from Tyson actually supports their attempt to depose Mr. Tyson. They allege that "the fact that the state showed the restraint of noticing Mr. Tyson after deposing lower level employees should weigh against granting a protective order." Plaintiffs' Response, p. 6. Plaintiffs make no effort to discuss the alleged inadequacies in the testimony of these other employees, nor do they even list these employees. Plaintiffs further argue that they should not be faulted for choosing to depose Mr. Tyson rather than filing a motion to compel additional 30(b)(6) testimony. Though the method of discovery, as Plaintiffs correctly point out, is left to the party seeking discovery, Plaintiffs' delay in seeking discovery they claim was denied in the 30(b)(6) deposition process brings their

motives into question. For 18 months, prior to Plaintiffs' attempt to depose Mr. Tyson, Plaintiffs were presumably satisfied with the testimony given by Steve Patrick. This is supported by their attempts to compel additional 30(b)(6) testimony from other defendants who they claimed presented similarly unprepared and unknowledgeable representatives. *See* State of Oklahoma's Motion to Compel the Cargill Defendants to Make a Knowledgeable 30(b)(6) Designee Available for Deposition and Integrated Brief in Support (Dkt. # 1155); The State of Oklahoma's Motion to Compel Defendant Peterson Farms, Inc. to Produce a Properly Prepared 30(b)(6) Designee for Deposition and to Allow Full Questioning of that Designee, and Integrated Brief in Support (Dkt. #1250). These Motions to Compel came within a month of the respective depositions Plaintiffs claimed were inadequate. Here, in a telling coincidence of timing, Plaintiffs raised the inadequacy of Steve Patrick's testimony for the first time on the discovery deadline, 18 months after his deposition and only after Tyson unsuccessfully sought to compel Attorney General Edmondson to appear for a deposition concerning recent public comments. Nevertheless, Plaintiffs incredibly attribute this unacceptable delay to a show of restraint on their part.

Plaintiffs claim to have identified several examples of alleged gaps in Steve Patrick's knowledge, but they fail to provide any evidence of how unique personal knowledge possessed by Mr. Tyson will fill these holes.[1] Instead, they simply point to his former position as CEO and one document to claim that Mr. Tyson possesses relevant knowledge and then speculate about whether he had conversations with former Governor Bill Clinton. However, Plaintiffs have not

[1] Tyson disagrees with Plaintiffs' claim that Mr. Patrick was inadequately prepared as a 30(b)(6) designee. However, Tyson will not waste this Court's time detailing the information provided by Mr. Patrick or explaining the depth of his preparation and knowledge on subjects relevant to the issues in this case given that Plaintiffs have not filed a proper motion challenging the preparation of Mr. Patrick or any of the other numerous 30(b)(6) designees produced by Tyson.

provided any evidence that Mr. Tyson possesses unique personal knowledge about any issue relevant to this litigation. Consequently, Plaintiffs have failed to provide any bases to overcome the protection granted to Mr. Tyson as an apex employee.

ARGUMENT

Plaintiffs have failed to provide any evidence that Mr. Tyson possesses unique personal knowledge regarding this case. This failure comes despite having deposed a substantial number of Tyson employees and other individuals associated with the poultry industry. Plaintiffs were unable to cite one instance where an individual in a deposition attributed unique knowledge to Mr. Tyson. Further, in the multitude of documents produced by Tyson in this case, Plaintiffs could only identify one document allegedly attributing unique personal knowledge to Mr. Tyson – a statement of environmental policy that Mr. Tyson did not write, that is irrelevant to the issues in this case, and that Mr. Tyson merely signed as the current CEO of Tyson while other employees created and implemented the actual policies set out in the document. Plaintiffs' entire argument relies on the assertion that John Tyson is a former CEO of Tyson Foods and possesses relevant knowledge of the policies in place during his tenure. Their argument ignores the apex doctrine recognized by this Court and fails to provide any evidence of unique personal knowledge possessed by Mr. Tyson.

A. Depositions of apex officials are improper absent a showing of unique personal knowledge

Plaintiffs are well aware of the protections granted to apex employees. This Court noted the doctrine through its reference to *Evans v. Allstate Insurance Co.*, 216 F.R.D. 515, 518-19 (Okla. 2003), in its order prohibiting the deposition of Attorney General Drew Edmondson. 2/26/07 Opinion and Order, 6 (Dkt. No. 1062). Plaintiffs, in their response, attempt to distinguish *Evans* from the case at hand, but to do so, they first edit the quotes extracted from

the court's opinion in that case to remove the inconvenient consideration that to warrant his deposition, an apex official must have "unique personal knowledge" about the controversy. Plaintiffs ignore this language and use commentary from the court regarding the facts of that case to change the rule to require only "relevant personal knowledge." The test articulated by the court in *Evans* is unique personal knowledge, not just personal knowledge. *Evans*, 216 F.R.D. at 518-19. Plaintiffs further mischaracterize the *Evans* opinion by suggesting that the court's decision in that case was based upon a finding that all information sought had been previously supplied in a 30(b)(6) deposition. *See* Plaintiffs' Response, p. 5 ("Furthermore, there is no indication that the defendant in *Evans* had designated an unprepared and unknowledgeable 30(b)(6) witness, as Tyson did here. In fact, the *Evans* Court indicated that the defendant there had 'already provided adequate information.' *Id.*"). Plaintiffs again omit important language from the *Evans* decision which actually states that "to the extent the Plaintiffs have a right to pursue these issues, Allstate has already provided adequate information, *or that the information can alternatively be obtained form other sources without deposing those "apex" officers.*" *Evans*, 216 F.R.D. at 519 (emphasis added).

Despite Plaintiffs' attempted revisions, the rule stated in *Evans* requires more than a showing that Mr. Tyson may have relevant knowledge; they must show that his knowledge is unique and unavailable from other sources. Plaintiffs have had ample opportunities to obtain the alleged relevant knowledge possessed by Mr. Tyson regarding company policies through

other sources.[2] That they are unhappy with the results of their discovery efforts to date is insufficient to warrant a fishing expedition through a harassing deposition of Mr. Tyson.[3]

B. Plaintiffs have failed to identify unique personal knowledge possessed by Mr. Tyson unavailable from other sources

As noted above, Plaintiffs, despite having deposed a substantial number of Tyson and poultry industry representatives and having reviewed the voluminous documents produced by Tyson and other defendants in this case, have failed to identify any unique personal knowledge possessed by Mr. Tyson. Instead, they rely on (1) Mr. Tyson's relationship with former Arkansas Governor Clinton, who commissioned a Task Force on Animal Waste in the early 1990's, (2) a statement of Tyson's environmental policy, signed by Mr. Tyson in 2004, and (3) the broad and unsupported assertion that Mr. Tyson is knowledgeable of and helped shape and implement Tyson's environmental policies. Taken in turn, each of the claims fail to identify unique personal knowledge held by Mr. Tyson that warrants his deposition.

Plaintiffs claim that "the State has learned from other sources that Tyson was involved in some capacity with former Governor Bill Clinton's Task Force in the early 1990's." Plaintiffs do not identify these alleged "sources." After three years of discovery, "learned from other sources" is an unacceptable citation to a statement of fact. Regardless, it is public

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[2] Moreover, if Plaintiffs are actually interested in gaining additional information about Tyson's environmental policies (as they claim), they will have yet another opportunity to obtain such information on May 1, 2009, when they depose Tyson's Chief Environmental Officer, Kevin Igli. The environmental policy attached by Plaintiffs' as Ex. B to their response was developed, written, and monitored by the Tyson team members who work under the direct supervision of Mr. Igli. *See* Ex. A, Igli Aff., 4/20/09.

[3] Tyson has reason to believe that harassment is the true purpose of Plaintiffs' request to depose Mr. Tyson. Tyson recently learned that Plaintiffs' counsel hired a Tulsa police officer to conduct "background checks" looking for "unsavory" information on several current and former Tyson executives, including Mr. Tyson. Ex. B, Steele Depo., p. 123 (4/7/09). Given that any information gained from such efforts would most certainly be inadmissible in this case, Plaintiffs appear to be trying to develop information to harass or embarrass executives working for the defendants. Such tactics would clearly be improper.

knowledge that Tyson had a member on this task force – Robert Harris – and Plaintiffs have never sought his deposition, nor have they issued a 30(b)(6) request regarding Tyson's involvement in Governor Clinton's initiative. *See* Ex. C, Task Force Membership, 3/20/92. The only connection between Mr. Tyson and this Task Force raised by Plaintiffs is "that Mr. Tyson is known to have had dealings with Bill Clinton." Plaintiffs' Response, p. 3. They include no citation, exhibit, or explanation of how those "dealings" equate to unique personal knowledge regarding this case. Plaintiffs can learn all they need regarding how the Task Force "shaped Arkansas' environmental regulatory practice as it pertains to the poultry industry" through review of the substantial document production already provided by various Arkansas state agencies on that issue.

The only actual document referenced in their attempt to show that Mr. Tyson possesses unique personal knowledge relevant to this case is a statement of Tyson environmental policy signed by Mr. Tyson in 2004. According to Plaintiffs, this document evidences how Mr. Tyson "has been in a unique position" to gain knowledge of historical events, and that as CEO, he was responsible for enacting environmental policies relevant to this case. Plaintiffs Response, p. 5. Plaintiffs' reliance upon this environmental policy is misplaced for several reasons. First, the policy at issue is directed primarily at Tyson's "company operations" (i.e., processing plants, feed mills, etc.) and has no bearing on the actions of contract growers and how each grower utilizes poultry litter produced on farms that are not owned or operated by Tyson. Environmental compliance at company operations are not at issue in this case. Second, Mr. Tyson does not possess unique personal knowledge regarding this policy. This statement of environmental policy was developed, written and monitored by the Tyson team members who

work under the direct supervision of Tyson's chief environmental officer, Kevin Igli. Ex. A, Igli Aff., 4/20/09. Plaintiffs will be deposing Mr. Igli on May 1, 2009.

Without sufficient evidence, Plaintiffs fall back on Mr. Tyson's role as CEO. They cite several cases which they claim stand for the proposition that several federal courts "have permitted the depositions of high level executives when conduct and knowledge at the highest levels of the defendant are relevant in the case." Plaintiffs Response, p. 4. In applying this principle to this case, Plaintiffs again misconstrue this Court's prior holdings. Their response states that "high level corporate knowledge of environmental matters and the actions taken to address those matters are highly relevant to Tyson's potential liability, including it's potential liability for punitive matters." Plaintiffs Response, p. 5. To support this statement, Plaintiffs cite *Zuniga v. Boeing Company*, 2007 WL 1072207 (N.D.Okla. Apr. 4, 2007), where the court permitted the deposition of an apex official regarding evidence relevant, in part, to the plaintiff's punitive damages claim. Plaintiffs make the inference that the court permitted this deposition because of the nature of the plaintiff's claim for punitive damages. However, this case cannot be read to suggest, as Plaintiffs would like for this Court to believe, that the mere assertion of a punitive damage claim is sufficient to override the protections of the apex doctrine and subject a CEO to a deposition. The court's holding in *Zuniga* was not that sweeping. The *Zuniga* Court considered the principles applied in *Evans*, and permitted the deposition because plaintiffs were able to point to a specific statement by a corporate representative in a 30(b)(6) deposition identifying unique personal knowledge held by the apex official regarding an Impact Ratio statistic analysis relevant to plaintiffs' punitive damages claim. Here, while Plaintiffs claim that high corporate knowledge is relevant to their claims,

they fail to explain why that is so or what Mr. Tyson supposedly knows that is relevant to their punitive damage analysis.

Finally, Plaintiffs allege that Mr. Tyson should be deposed because they now claim that Tyson provided an ill-prepared or uninformed 30(b)(6) witness in a deposition taken 18 months ago. Because of this alleged deficiency in the 30(b)(6) deposition testimony, Plaintiffs claim that they are "entitled to full discovery of Tyson's corporate knowledge of the potential environmental impacts from poultry waste and how that knowledge has, or has not, shaped Tyson policies and practices." Plaintiffs' Response, p. 3. Plaintiffs' belated complaints about the 30(b)(6) deposition cannot justify their request to depose Mr. Tyson. The test is whether Mr. Tyson possesses unique personal knowledge about some issue relevant to this case. Plaintiffs have presented no evidence or reason to support their claim that Mr. Tyson possesses such information. Mr. Tyson signed an affidavit stating under oath that he has no personal knowledge regarding this case or Tyson's environmental policies beyond the information available to Plaintiffs through the Tyson 30(b)(6) representatives. That Plaintiffs are unsatisfied with the amount of knowledge possessed by Tyson regarding issues they believe to be relevant to this lawsuit speaks more to the quality of their own case than to the competence or knowledge of Steve Patrick. There are numerous former and current high executive officials in Tyson Foods, all of which could have the same type of generalized knowledge Plaintiffs attribute to Mr. Tyson. There is no basis for targeting one former executive for a harassing deposition when none of them possess unique personal knowledge regarding the issues in this case. Tyson is a large company, and environmental issues of this nature are left to employees designated to deal with those issues. Plaintiffs have had three and one-half years to identify and depose those employees at Tyson with environmental responsibilities and they have one more

opportunity to seek information from Tyson's highest-ranking environmental officer when they depose Kevin Igli on May 1, 2009. There is simply no basis to subject Mr. Tyson to a harassing and unproductive deposition.

CONCLUSION

For these reasons, and those stated in Tyson Foods, Inc.'s Motion for Protective Order, Tyson Foods asks that this Court enter an order prohibiting the deposition of John Tyson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of April 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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